

**Testimony Of**

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**On Behalf of Major League Baseball**

**Before the**

**Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary  
United States House of Representatives**

**Satellite Television Laws in Title 17**

**September 10, 2013**

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Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify, on behalf of Major League Baseball, concerning the Section 119 satellite compulsory license that is scheduled to expire at the end of next year. I have been Major League Baseball's outside counsel on copyright and telecommunications matters for more than thirty-five years. During that same period, I also have served as lead counsel in satellite and cable compulsory licensing proceedings for the Joint Sports Claimants, which consists of Baseball, the National Football League, National Basketball Association, National Hockey League and National Collegiate Athletic Association. While I am presenting this testimony solely on behalf of Baseball, all JSC members share a common interest in ensuring strong and effective copyright protection, and fair market compensation, for the telecasts of their games.

**Baseball's Copyrighted Telecasts**

When Congress comprehensively revised the copyright laws in 1976, and adopted the Section 111 cable compulsory license, the average sports fan had access to approximately 100 telecasts of Major League Baseball games each season. Much the same was true in 1988 when

Congress enacted the satellite compulsory license by adding a new Section 119 to the Copyright Act. Today, however, the situation is very different.

Baseball and its member clubs now offer their fans the ability to view virtually every one of the approximately 5,000 MLB game telecasts each year. Telecasts of MLB games are available on the FOX national broadcast television network; three national cable networks (ESPN, TBS, MLB Network); over-the-air broadcast stations throughout the country (*e.g.*, WUSA-TV in Washington DC and “superstation” WGN-TV in Chicago); and more than two dozen regional sports networks (*e.g.*, MASN, FOX Sports Net). In addition, Baseball’s “out-of-market” satellite and cable package, MLB Extra Innings, provides each subscriber with virtually all Major League Baseball games not otherwise available from other licensed telecasters. Fans in Washington DC, for example, can view game telecasts of the Yankees, Red Sox, Cardinals, Pirates, Giants and a score of other teams. More than 67 million cable and satellite subscribers in the United States currently have access to MLB Extra Innings.

The comparable out-of-market package for Internet-connected devices, MLB.TV, is available to subscribers through more than 350 such devices -- including personal computers, smartphones (Apple, Blackberry and Android), tablets (iPad, Kindle Fire and Android) and a variety of consoles (Xbox360, Sony Playstation 3, Apple TV, Roku). In addition to receiving access to out-of-market games, MLB.TV subscribers can choose whether to listen to the radio or TV broadcast of the home or visiting club. MLB.TV also offers access to HD quality broadcasts of the games and provides DVR capabilities that allow fans to pause or rewind live telecasts. And those who utilize the MLB.com At Bat app to view games can take advantage of several additional features, including real-time statistical updates and analyses, video archive and a “pitch-by-pitch widget” that tracks the location, type, and speed of every pitch (including

whether a pitch is a curve ball, slider, or knuckle-curve). The At Bat app has been downloaded more than 22 million times since its debut five years ago.

All of the MLB game telecasts, whether they are accessible over-the-air or via cable, satellite or Internet-connected devices, are copyrighted works. In the 1976 Copyright Act, Congress -- at the urging of Baseball and other sports interests -- clarified that telecasts of live sports events receive copyright protection, like any other audiovisual work, as long as they are recorded ("fixed") simultaneously with their transmission. When entering into licensing agreements with its various rightsholders, Major League Baseball and its member clubs contractually ensure that the resulting telecasts are recorded and that either Baseball or one of its clubs will own the copyright in those telecasts. With approximately 5,000 MLB game telecasts each year, Major League Baseball is a major copyright owner and source of television programming. Baseball relies heavily upon the copyright laws to protect its substantial investment in (and incentive to create) that highly entertaining and valuable programming.

### **Compulsory Licensing**

The satellite compulsory license in Section 119 of the Copyright Act permits satellite carriers to retransmit to their paying subscribers, without the consent of copyright owners, out-of-market broadcast television programming. The retransmitted programming includes the telecasts of games that Major League Baseball and its clubs license to broadcast stations and the FOX broadcast network. A similar compulsory license, which applies to cable systems, exists in Section 111 of the Copyright Act. The effect of these licenses is to divest Baseball (as well as other copyright owners) of any ability to negotiate with satellite carriers and cable systems over the terms on which those services commercially exploit broadcasts of MLB games.

These licenses are impediments to the operation of the free marketplace. They unfairly deprive all copyright owners, including Baseball, of the ability to control the distribution of their copyrighted works -- as well as the right to receive fair market compensation and other license terms typically included in marketplace agreements. They also impose significant administrative costs upon Baseball and other copyright owners and substantially delay the receipt of compensation for the use of their programming. Baseball routinely negotiates in the marketplace with the cable and satellite industry concerning the carriage of Baseball telecasts; the vast majority of programming that cable systems and satellite carriers offer are the product of marketplace negotiations. There is no reason that similar negotiations should not be allowed to occur over the broadcast programming now covered by the compulsory licenses.

#### **Fair Market Compensation**

Some parties have taken the position that elimination of the compulsory licenses could be disruptive to the marketplace, because the licenses reflect the settled expectations of the licensees and at least some licensors. Baseball respectfully disagrees with that view. An inequitable and unjustifiable regulatory regime that supplants marketplace negotiations should not be perpetuated simply because some parties have become accustomed to it. However, Baseball understands the practical difficulties associated with elimination of the cable and satellite compulsory licenses.

If the compulsory licenses are retained, Baseball urges Congress to ensure that both cable operators and satellite carriers pay fair market value for all programming they choose to carry pursuant to the compulsory licenses. Baseball believes the relevant evidence demonstrates that neither cable operators nor satellite carriers are paying fair market value under their compulsory licenses. Indeed, satellite carriers are currently paying a Section 119 royalty that is less than the royalty that three independent arbitrators considered to be fair market value in 1997 -- sixteen

years ago. Moreover, the total Section 119 royalties have declined by approximately \$10 million per year since Congress last reauthorized the Section 119 license. The Section 111 royalty paid by cable operators is comparably below fair market value. Indeed, when Congress adopted the Section 111 royalty rates nearly forty years ago, it explicitly noted that those rates would produce only a “minimal” royalty that had no economic basis. Cable operators pay less than one-half of one percent of their \$66 billion in video revenues (according to the FCC) for the Section 111 compulsory license that allows them to offer some of their most valuable television programming.

There is no justification for requiring copyright owners to subsidize, with below-market royalty rates, the major corporate entities that dominate the cable and satellite industries. Baseball believes Congress should, at the very least, authorize the Copyright Royalty Board to set market rates for the carriage of all programming under the cable and satellite compulsory licenses. The CRB also should be authorized periodically to adjust those rates so that they continue to provide fair market compensation to copyright owners.

While Section 119(c) of the Copyright Act directs the Copyright Royalty Board to adopt fair market value rates for the satellite carrier license, that provision sets a series of procedural dates that focus upon 2010, when Congress last renewed the Section 119 license. Section 119(c) must be amended to permit the adjustment of royalty rates for whatever period, if any, Congress decides to continue the Section 119 compulsory license. Congress also should adopt a similar rate adjustment mechanism for the compulsory license of cable systems, which compete with satellite carriers in the delivery of broadcast television programming. Currently, the law allows adjustments in the cable royalty rates to account for inflation only.

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Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to express Baseball's views on the satellite compulsory license in Section 119 of the Copyright Act and the related cable compulsory license in Section 111 of the Act. Baseball looks forward to working with you and your Subcommittee to help ensure strong and effective copyright protection, including fair market compensation, for all copyrighted works.